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ORIGINAL

FILED
JUL 29 1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals was not reported but is included as Appendix A to the Petition for Writ of Certiorari. The opinion of the District Court is likewise unreported and appears as Appendix B to the Petition for Writ of Certiorari. The opinion of the Tennessee Court of Criminal Appeals of the Court's judgment was filed on February 27, 1981, and was unreported but appears as Appendix C to the Petition for Writ of Certiorari. The unpublished Order of the Supreme Court of Tennessee, denying discretionary review, was filed on November 30, 1981, and appears as Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 1, 1985.

The Petition for a Writ of Certiorari was filed on May 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner (i.e. State of Tennessee) seeks to have this Court set aside the judgment of the U. S. Sixth Circuit Court of Appeals which affirmed the decision of the United States District Court for the Middle District of Tennessee which granted respondent, Stanley Clark, habeas corpus relief setting aside his conviction and life sentence for first degree murder and ordering that he be granted a new trial (Pet. Appendix A, B, C, D). The respondent in his petition for habeas corpus relief to the District Court had raised several constitutional issues, but the District Court pretermited and did not determine any issues other than those dealing with the accused's contention that jury instructions dealing with the presumption of malice violated defendant's due process rights under the Fifth and Fourteenth Amendments by impermissibly shifting the burden of proof on that issue to defendant effectively requiring him to disprove malice which was an essential element of the crime for which he is convicted, in violation of the principles enunciated in the U.S. Supreme Court decision in Sandstrom v. Montana, 442 U.S. 510 (1979).

Petitioner (i.e. State of Tennessee) now asks this Honorable Supreme Court to reverse the U.S. District Court and Sixth Circuit Court of Appeals based upon the State's contentions that the State Trial Court's jury instructions on malice did not impermissibly shift the burden of proving malice to the respondent and that any error in the Court's jury instructions on malice was

harmless beyond a reasonable doubt (Pet. A.).

DISCUSSION

It is proper to note at the outset that the statement of case and the factual assertions contained in the petitioner's Petition for Writ of Certiorari reflect a one-sided view of the evidence and failed to give a proper view of what actually was presented at the trial. In particular, respondent would show as follows:

A. First, petitioner asserts that a police officer observed a brownish-colored pickup truck belonging to Stanley Clark in the general vicinity of the homicide, when in fact, the officer simply noticed a vehicle of that color following another vehicle five to ten miles from where the shootings occurred and the officer acknowledged that this occurred at night on an unlighted country road, and he did not pursue the vehicle since there was no apparent crime or offense being committed and he could not identify the occupants of either vehicle, did not obtain any license number of specific identification of the vehicles, and was only "assuming" that the vehicles he had seen earlier, in fact, belonged to the defendant and the victims (Tr. 83-86).

B. The bodies of the deceased -- Joy Faulk and Charles Calvin ("Charlie Sue") Browning -- were discovered in Browning's pickup truck parked in front of the trailer home of Jef Faulk on Threet Road in Rutherford County, Tennessee, on the night of December 30, 1978 (Tr. 34, 45-46).

C. The two minor children, Mitzi Faulk, age 6 and Michelle ("Shelley Bean") Faulk, age 3, the daughters of Sam Faulk, were found by the side of the road a considerable distance from the scene of the incident by

passersby Mr. and Mrs. Marion Smith about 9:30 to 10:00 that same night (Tr. 257).

D. According to Mr. Smith, the children did not name who had done the killing, but the oldest of the two girls, Mitzi, said: "She said they were fighting, they had guns. Her mother had been shot or killed. And I asked her who she was . . ." (Tr. 306, 315-316).

E. Mr. Smith's wife, Mary, originally testified consistent with Mr. Smith at the preliminary hearing (Tr. 269-280).

F. Upon trial, however, her story changed and she suddenly had recollection that Mitzi had said:

1. "Charles and Clicker have got guns." (Tr. 299).

2. "Clicker shot my mother." (Tr. 299).

G. Under cross-examination by defense counsel, Mrs. Smith admitted that when she testified previously that she had testified that the child did not say who shot her mother, but now says that the child did mention someone, the defendant (Tr. 269-280).

H. In this testimony, Mrs. Smith acknowledged that she was hostile to even coming to Court and that her testimony had changed from hearing to hearing, based upon her feelings about the matter, such as the manner in which she was subpoenaed to come to Court (Tr. 272-274, 278-281).

I. Records of the Rutherford County Sheriff's Office indicated that the complaint call which caused the investigation of this matter was received by Lt. David Garant and indicated that Mr. Bill Hackney had called at 10:12 p.m. (Tr. 890), stating "two juveniles came to Mr. Hackney's house saying their father shot someone." (Tr. 890-891).

J. The testimony of the child, Mitzi Faulk,

demonstrated that she had no real conception of the meaning of an oath and that her testimony was very unreliable. As the Trial Judge said to defense counsel, "You so successfully contradicted her stories with your cross-examination that her credibility has been impeached, . . ." (Tr. 256).

K. One of the victims was found to have a gun in his pocket (Tr. 155) and the investigating officers found a fifth bullet cartridge or shell that did not come from the murder weapon, but the police lost this fifth shell so that no ballistics could be performed upon it (Tr. 173-174).

L. Lt. David Garant of the Rutherford County Sheriff's Office testified that he took the incoming complaint call and made the record of the call which showed that Mr. Hackney had called and said that two juveniles appeared at his home and said their "father" had shot someone (Tr. 890-891).

M. Sylvia Hillis Barrett testified on behalf of the State that she was with the defendant on several occasions during the days immediately prior to the shooting. On cross-examination the defense brought out through the testimony of Mrs. Barrett that for some months prior to the homicides, the petitioner had engaged in strange behavior; he had acted as if he really didn't know what he was doing; had lost some 35 pounds in weight; could not even sleep; was bothered by his reminiscences of his experiences in Vietnam; could see in his dreams Vietnamese people coming at him; was greatly depressed; acted as if he were a different person; grew progressively more quiet; and was very withdrawn; and was upset physically and depressed emotionally (Tr. 521-525).

N. Two psychiatrists testified for the defense. The defense psychiatrists were Dr. John Griffin

and Dr. Roger White (Tr. 789-850, 850-887), both of whom testified that they had examined the defendant and that if, in fact, defendant was present at the incident wherein the victims were killed, he has no conscious memory of it (Tr. 800-801, 860-862). They also both stated that because of his long standing depressive neurosis which had markedly worsened just prior to the incident, defendant was, at that time, unable to conform his conduct to the requirements of law because of his depression (Tr. 799, 859-860). They affirmed that if defendant was present at the shootings he has no recall or memory of it, despite attempts to unlock his memory by "truth serum an hypnosis", but has suppressed them completely (Tr. 840-841, 860-862). On cross-examination the State brought out that the defendant had stated to Dr. Griffin that on the day the death occurred the defendant stated he had consumed 36 beers and a quantity of vodka (Tr. 814-815).

O. At the outset of the trial before any proof was even introduced, defense counsel in his opening statement specifically stated to the jury that even if they found the accused was, in fact, the one who shot the victims, nevertheless defense would show that the accused has amnesia and has no recollection of the events and "That due to his mental condition he could not have possessed the mental capacity required to establish his guilt" (Tr. 24).

P. At the close of all of the evidence the Trial Judge stated "The principal issue here as the Court discerns it after three an one-half days of trial, is who killed these people, or if this defendant did what was his state of mind?" (Tr. 763).

Q. Throughout the presentation of the evidence for the defense, the Trial Judge inquired of counsel as to

whether he should charge the jury on all four degrees of homicide (Tr. 774). Defense counsel requested him to do so and stated "That the appropriate charges that if you find the defendant killed while suffering from a mental disease or defect so great as to render him unable to formulate a specific intent or to harbor malice, but not so great as to render him insane, is voluntary manslaughter" (Tr. 774). The Trial Judge further recognized that proof regarding intoxication had been introduced and asked defendant's counsel if he desired an instruction concerning the effect of intoxication upon the mental elements of the defense and defense counsel requested that the jury instruction be given (Tr. 776).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals correctly held that the Trial Court's jury instruction on malice impermissibly shifted the burden of proving malice to the respondent.

Petitioner in its brief contends that the Sixth Circuit has misapplied the holding of this Court in Sandstrom, contending that the challenged instructions when taken in context with other jury instructions did not impermissibly shift the burden to defendant on the issue of malice. Even a cursory examination of the actual instruction given, however, clearly shows how untenable this argument actually is. In its charge to the jury the Court instructed as follows:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the state has proven beyond a reasonable doubt that the killing has occurred, then it is presumed that the killing was done maliciously. This presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the

> same be offered by the defendant, or exists in the evidence of the state" (Tr. 1087, 1088).

The Court likewise charged the jury:

> If it is shown beyond a reasonable doubt that the victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption" (Tr. 1084)." [1]

The Sixth Circuit rejected the State's argument based upon the language of Sandstrom and its own prior decision in Phillips v. Rose, 690 F.2d 79 (6th Cir. 1982). The Court noted that part of the instructions given in the present case is similar to those given in Phillips and the Sixth Circuit summed the matter up aptly,

> "Appellee argues that the error, if any, was cured by another jury instruction in this case which directed the jury to consider all the evidence in reaching a verdict. We find this argument unpersuasive. We find the instructions in question hereto run afoul of Sandstrom, and that Phillips is also persuasive, because the intent of petitioner, and any other defenses raised by him relating to his mental capacity at the time, were very much at issue." (Pet. A-4).

There is simply no rational basis for the State's contention that a jury instruction which tells the jurors that all homicides are presumed to be malicious and that if the State has proven beyond a reasonable doubt that the killing has occurred, then it is presumed that the killing was done maliciously, would not have a burden-shifting

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1/ Although the failure of the defendant to object to the jury instructions at the trial has never been an issue in these proceedings, and the Court of Appeals correctly noted that the Tennessee Appellate Court did not rely upon any procedural default but rejected petitioner's constitutional challenge on its merits, (Pet. A-3), in fact, there was no procedural default since the instructions issue was raised by defendant in his motion for new trial and under Tennessee Rules of Criminal Procedure 30(b) dealing with objections to jury instructions, it is specifically provided that "failure to make objections shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial."

affect simply because it was stated that the presumption could be rebutted and there was an additional general jury instruction to the effect that the State has the burden of proving each element of the crime beyond a reasonable doubt. Indeed, the instruction in question is drafted in such a fashion as to clearly indicate the intent of the Court to shift the burden to the defendant to rebut the presumption of malice in accordance with the long standing Tennessee authorities which pre-dated Sanstrom. As stated by the District Judge, whose opinion was affirmed by the Sixth Circuit,

> "The respondent argues there was no Sandstrom deficiency here because the trial-judge instructed the jury also that the burden was on the State to prove the existence of malice beyond a reasonable doubt and that the jury should consider all the facts and circumstances in determining whether the State had met such burden. This very argument was rejected in Phillips v. Rose, supra, because these additional instructions are not inconsistent rhetorically with the existence of a burden-shifting presumption, since a reasonable juror could have regarded the presumption of malice as a means by which proof of malice beyond a reasonable doubt could be satisfied. Id., 690 F.2d at 81; accord: Engle v. Koehler, supra, 707 F.2d at 245.

> Under the instructions given by the trial-judge, the jury could have understood reasonably that the prosecution could meet its burden of proving the element of malice merely by showing that a killing had occurred; that once the State demonstrated a killing, malice was presumed, and it then devolved upon Mr. Clark to negate the existence of such element . '***Such an instruction effectively shifts the burden to the defendant of disproving an element of the crime. This is constitutionally forbidden.***' Krzzeminski v. Perini, supra, 614 F.2d at 124-125; accord: Lockett v. Arn, supra, 728 F.2d at 272 ('Such a presumption forces the defendant to assume the burden of disproving an essential element of the crime.') (Pet. A-14, 15).

2. The Sixth Circuit Court of Appeals correctly applied the harmless error doctrine to the facts of this case.

The petitioner (i.e. State) asserts that the error created by the instructions was harmless. The Sixth Circuit Court of Appeals agreed with the District Court's finding:

> "Accordingly, we agree with the trial court in this case that there was a Sandstrom violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of mens rea, the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury." (Pet., A-6).

As the District Judge stated in his thorough evaluation of the effect of the error:

> In this Circuit,
>
> > • • • the prejudicial effect of a Sandstrom instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a Sandstrom instruction may be harmless. Conversely, if the defendant asserts lack of mens rea, a Sandstrom instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. • • • " (Emphasis added). (Pet., A-15.

16).

After applying that rule, the Court then concluded,

> "Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them; (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.
>
> From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a mens rea defense, in addition to the claim of non-participation, was evident throuthout the entire trial:" (Emphasis added). (Pet., A-16, 17).

The Judge thoroughly analyzed the record and noted that the defendant (1) raised the issue of mens rea in his opening statement at the outset of the trial, (2) brought out evidence on cross-examination of the State's witness showing that the defendant had engaged in strange behavior, was experiencing mental problems and was upset physically and depressed emotionally, (3) noted that the Trial Judge himself recognized after the State had rested its case in chief, that "the principal issue here as the Court discerns it after three and one half days of trial, is who killed these people, or if the defendant did what was his state of mind", (4) noted that defense counsel requested that the Judge charge the jury concerning defendant's ability to formulate specific intent to kill or to harbor malice, (5) that defense counsel requested that a jury instruction be given concerning the effect of drunkness on defendant's mens rea, (6) noted that the defense called two

psychiatrists who testified that defendant's mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of law, (7) called a psychiatrist who acknowledged that the defendant had informed him that he had consumed six six-packs of beer plus a quantity of vodka on the date the killings ocurred, (8) called a second psychiatrist who diagnosed the defendant as having a serious and rather long-standing depressive neurosis as a result of which defendant could not conform his behavior to the requirements of the law and (9) that each of these doctors supported petitioner's claim that if, in fact, he committed the offense he had no recollection of the offense of that day due to amnesia. (Pet., A-17, 18, 19).

In view of the District Judge's diligent analysis of the harmless error doctrine and his extensive review and application of the facts of this case to that doctrine, and the concurrence of the Sixth Circuit in the conclusion that the error was not harmless, there simply is no basis for the State's harmless error argument. It is even more difficult to understand how the State could, at page 11 of its petition, state that "the appellee basically acknowledged that the murders were committed in a malicious manner." This is absolutely untrue and as the District Judge specifically noted, supra, "From the outset of the trial it was clear that the defense was unlikely to concede anything rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental." There is simply no basis for petitioner's assertion that the defendant by an insanity defense under the circumstances of this case acknowledged the elements of the crime; in fact, the defendant contested every element and

every proposition of fact raised by the prosecution.

Defendant contested not only the issues of insanity but indeed the issues regarding how and why the crime was committed and specifically suggested that if, in fact, the accused did shoot the victims it was as a result of a fight and brought out to the jury that the child witness to the events had stated "They have guns; and they are fighting," (Tr. 306, 315, 316, 998, 1051) and that a fifth shell was found at the scene by the police which would indicate that another shot was fired by someone other than the defendant (Tr. 1051) and one of the victims was found to have a pistol in his pocket (Tr. 155) and that the defendant's counsel throughout his closing argument to the jury repeatedly asserted that the defendant was not required to prove he was innocent and due to his amnesia could not tell what happened even if he had been at the scene and that "I submit to you if you have a reasonable doubt about any aspect of this case that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty." (Tr. 1049, 1050).

Furthermore, the State actually sought to shift the burden to the defendant and the District Attorney took full advantage of the improper presumption by stating in his closing rebuttal argument,

> "You are justified in finding willful, deliberate, malicious and premeditated murder. There has been no proof whatsoever to the contrary, that this was not a first degree murder" (Tr. 1071).

Under such circumstances it is inconceivable that the State could reasonably claim that defendant had acknowledged the murders were committed in a malicious manner or that the defense acknowledged the elements of the crime or that the error was harmless.

3. Evidence of defendant's consumption of vast

quantities of alcohol was a proper subject or circumstance for consideration by the jury on the issue of defendant's mental state or mens rea.

The State further contends that the Trial Judge misintrpreted Tennessee law concerning voluntary intoxication; this too is an incorrect statement of the facts and Tennessee law. The State itself during its cross-examination of the defense's psychiatrist brought out substantive evidence of intoxication by way of an admission by the defendant in an apparent attempt to prove that defendant's amnesia was a result of intoxication rather than insanity (Tr. 814-815), and the State can hardly complain about evidence the State itself introduced into the record. At any rate, whatever the purpose of the State's cross-examination, it clearly introduced the evidence of defendant's consumption of vast quantities of alcohol on the day in question and was sufficient to convince the Trial Judge to charge the jury concerning intoxication. (Tr. 776).

Furthermore, under State v. Adkins, 653 S.W.2d 708 (Tenn. 1983) a case in which the evidence showed that the defendant spent most of the day of the killings drinking beer with various persons and had consumed about 24 bottles of beer that day, the Court there stated,

> "Voluntary intoxication is never a justification for a crime, but its existence may negate a finding of specific intent. State v. Bullington, supra, at 560. If the accused is so intoxicated that he is incapable of forming a premeditated and deliberate design to kill, he cannot be guilty of murder in the first degree; and even when an intoxicated defendant is capable of forming a specific intent, his drunkness may be considered in determining whether he specifically intended the particular act for which he is on trial. State v. Bullington, supra." (Underscoring added).

And under the decision of State v. Taylor, 668 S.W.2d 681 (Tenn. Cr. App. 1984),

> "Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another."

Thus, under Tennessee law to prove malice whether actual or implied requires a finding of intent to do injury to another and intoxication, or the effect of alcohol, (particularly when coupled with depression or mental illness) can be considered in determinng whether or not the defendant was capable of forming a malicious intent or "a design formed in the mind of doing mischief to another". The jury obviously was entitled to consider anything which could have affected the mental state of the accused in determining whether he was capable of forming the intent necessary to establish malice, and "in determining whether he specifically intended the particular act for which he is on trial"." Clearly, the Trial Judge properly recognized the right of the jury to consider the evidence of intoxication, together with the other evidence reflecting upon defendant's mental state on the issue of the intent required to formulate malice, and the District Court and Sixth Circuit properly held that the evidence of his strange behavior, depression, intoxication and insanity related to the defendant's mens rea concerning malice.

4. The District Judge did not mis-apply the law regarding amnesia.

The State contends that the Court misinterpreted Tennessee law concerning appellee's claim of amnesia and that amnesia is not a defense to the crime under Tennessee law. This assertion at page 12 of the State's petition illustrates once again how the State simply overlooks or disregards what the Court found and stated. Nowhere did the Sixth Circuit Opinion ever mention the word "amnesia"

much less state that it was a "defense". Likewise, the District Judge nowhere stated that amnesia was a defense, but rather he simply pointed out that defendant's claim of amnesia was supported by the doctor's testimony and that it was relevant insofar as it reflected upon his state of mind. (Pet. A-19,20). Certainly, the defendant never conceded that his actions, even if he had, in fact, killed the victims, were malicious or intentional, since he had absolutely no recollection of the events. As pointed out above, defendant sought to show that if, in fact, he participated in the events, the deaths were not malicious but were the result of a fight and his mental illness and intoxication. The State thus raises a non-issue.

5. The weight of the evidence on the issue of malice is irrelevant to the issues in this case.

The State next contends that the proof "overwhelmingly established the element of malice" and goes on for several pages in detaling what it asserts as being evidence of malice. However, this ignores the fact that the issue of the sufficiency of the evidence to convict is not at issue in cases such as this, since, as stated by the U.S. Supreme Court in Connecticut v. Johnson,

> "A judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on fact within the condemned instructions . . . or an actual authorization or ratification of such acts . . . a failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction." (Underscoring added).

The Supreme Court there went on to state,

> "An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the

> verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made. The Court in Bollenback v. United States, 326 U.S. at 614-615 stated: 'All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished.' See County Court of Ulster County v. Allen, 442 U.S. 140, 160 (1979). ('It is irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support a conviction.')." (Underscoring added).

Since the defense did not merely claim non-participation but to the contrary contested every element of the charge and contended that even if the defendant shot the victims, the deaths occurred as a result of a fight and that due to the various factors affecting his condition did not possess the mental sate to establish his guilt, the issue of *mens rea* concerning malice was clearly raised and thus the harmless error doctrine does not apply regardless of the weight of the evidence.

CONCLUSION

Respondent respectfully submits that the petitioner has not presented any valid basis for granting the Writ of Certiorari and that the Petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1974

JIMMY C. ROSE, WARDEN, PETITIONER

v.

STANLEY BARHAM CLARK, RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief Of The Respondent In Opposition To Petition For Certiorari was mailed, postage prepaid, to Mr. W. J. Michael Cody, State Attorney General, and Ms. Kymberly Lynn Anne Hattaway, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025, on this 23rd day of July, 1985.

Scott Daniel